

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS

FOR THE NINTH JUDICIAL DISTRICT

HENRY SORENSON,

Appellant,

vs.

ALASKA STEAMSHIP COM-
PANY, a corporation,

Appellee.

No. 3102

APPEAL FROM THE UNITED STATES DIS-
TRICT COURT, DISTRICT OF WASH-
INGTON, WESTERN DISTRICT,
NORTHERN DIVISION.

BRIEF OF APPELLANT

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STATEMENT.

This cause is a libel *in personam* against the respondent and appellee, the Alaska Steamship Company, a corporation incorporated under the laws of the State of Nevada, and doing business in the State of Washington.

The libel alleges that contractual relations existed between libellant and respondent before and on the 21st day of February, 1916; that libellant was an able seaman employed on board the S. S. Victoria, one of the respondent's vessels, which was being operated by respondent between the Port of Seattle and ports in the District of Alaska; the vessel had been lying at Boat Harbor, British Columbia, for several days prior to the 21st day of February, 1916, taking in a cargo of coal, which was being loaded on the ship by a gang of workmen employed by the owner of the coal at Boat Harbor, and assisted by the crew of the vessel, among whom was the libellant; the coal was poured from chutes into the hold of the vessel through the hatches of Compartment No. 2, and was only partially trimmed in the hold of the vessel, and in so doing there was left a considerable space below the 'tween decks in Compartment No. 2, which space extended around the hatchway in the lower hold of said Compartment No. 2, sufficient for the boatswain of the ship to walk around under the 'tween decks after the explosion in which libellant was injured; the cargo of coal after being loaded and partially trimmed at Boat Harbor, remained in the same condition for two days, and was in such condition at the

Port of Seattle on the morning of February 21st, 1916; the coal pile so taken in Compartment No. 2 reached from the hold of the vessel to and above the steerage deck (the second deck of the ship), filled all the space of the hatchways, and flowed out and around the hatch upon the 'tween decks, and completely shut out all ventilation of the said space so left in the lower hold of Compartment No. 2, this space was left unfilled at Boat Harbor, and unventilated until Monday morning, February 21st, 1916.

Orders on that date were given by the Master to the First Officer, and by him to the Boatswain to trim coal in Compartment No. 2, as they would take in freight at Bellingham.

The boatswain, McDonough, at about 7 o'clock A. M. on said February 21st, 1916, ordered libellant, Henry Sorenson and several other seamen to go into Compartment No. 2 'tween decks and "trim coal and leave space forward of the hatch 'tween decks for cargo to be taken at Bellingham; trim it anywhere, to do away with it the best way we possibly could."

These men were furnished with coal oil lanterns which were ordinary unguarded lights, common tubular lanterns, already lighted, and shovels to trim coal as above stated, at 7 o'clock A. M.

February 21st, 1916.

The libellant and three others went below to 'tween decks and for three hours trimmed coal to the wings of the ship and aft as high as the steerage deck in Compartment No. 2, until the coal from the pile began to run back on the shovellers; in other words the wings and aft of Compartment No. 2 were filled with coal, so that it would run back when shovelled upon the pile against the wings and aft.

Libellant Sorenson had been in the crew which had partially trimmed the coal in the lower hold of Compartment No. 2 at Boat Harbor; he knew that ample space existed in the lower hold below the 'tween decks in Compartment No. 2; a cone shaped pile of coal was still left in the 'tween decks hatchway after so trimming in the wings and aft, and ample space still existed in the lower hold beneath 'tween decks for such coal, and to place it there was the natural, proper and most expeditious way to dispose of this cone shaped pile still left in the 'tween decks hatchway.

The libellant thereupon under the orders so given by the boatswain to trim the coal the best way they could, to trim it anywhere, shovelled a hole in the corner of the 'tween decks hatchway

sufficient for him to slide through to the lower hold; this done he called out to the men above, "plenty of space down here," and asked for a lantern, which being handed to him, into the hold, burned first with a blue flame, and was immediately followed by a violent explosion of gas in this unventilated space where libellant was, burning and scarring his face, hands and body, and permanently injuring the left hand so far as to render his vocation as a seaman at an end; and the use of the left hand for any manual labor.

Libellant's sufferings were intense; his flesh was burned from his hands, requiring the use of morphine to deaden the pain of the dressings three times a day during two weeks, and was discharged from the hospital after seven weeks.

The ship was equipped with electric cluster lights with extension cords of sufficient length to reach to and were intended to furnish light to the lower hold.

Neither libellant nor the crew with him knew of the gas in the lower hold, nor had the slightest suspicion of its presence in the space into which libellant was attempting to trim the coal; nor anywhere else; this space in the lower hold was the natural and proper place to trim this coal pile in

the 'tween decks hatchway, which filled this entire hatch about 16 to 17 feet square, and reached about 6 or 7 feet above the coaming of the hatch; that this space was the natural and proper place to trim this cone shaped pile, for, *after the accident*, said coal *was trimmed* under the orders of the officers of the ship, into said *spaces* in the lower hold, and electric cluster lights were used in the trimming, instead of the open, unguarded lighted lanterns which were used by the crew at the time of the explosion.

SPECIFICATIONS OF ERRORS.

The final decree of the District Court includes no findings of fact save as to the hearing and trial of the case, and that "*heretofore on the 20th day of February, 1917, having filed its Memorandum of Decision,*" and dismissing libellant's cause.

The Assignment of Errors therefore runs to the findings in the Memorandum of Decision, as made a part of the Final Decree, although the errors assigned under the 9th, 10th, 11th and 12th assignments directed to the Final Decree support all the assignments and contentions of libellant in this appeal.

Digest of the evidence under each error assigned is cited to facilitate the convenience of the court.

I.

Under the first error assigned, that the hatch was filled and sealed by *professional sealers*, is scarcely comprehensible.

There were no professional sealers, and the hatch was not sealed. A gang of workmen, miners and stevedores at Boat Harbor and part of the ship's crew partially trimmed the coal in Compartment No. 2, and then put on hatch covers on the steerage deck over the extreme top of the pile. This constitutes all the sealing that was done.

What the Honorable Court had in its mind as to *professional sealers*, and *sealing the hatch*, cannot be understood: sealing of cargo on ships is only done by some officer of the law armed with *process or writ*. The coal being sealed (whatever that means) at Boat Harbor seems, from the Court's findings, to have a governing influence upon the decision it rendered, but in what manner it affected the trimming of the coal and the explosion at Seattle is not in any way disclosed by the reasoning of the Court, except that at the time the hatch was *sealed* a circular "V" shaped opening was formed around the hatch (between decks hatch in Compartment No. 2 in the hold) about five feet wide at the top and four deep."

This finding, as to the size of the space left, is utterly contrary to the positive evidence of the only witnesses who knew the facts.

TESTIMONY OF LIBELLANT, HENRY SORENSON, as to the space in the hold below 'tween decks hatch in Compartment No. 2. (Page and line refer to Transcript of Testimony.)

"Lots of space there on the fore part" (of the hatch; points out space on libellant's Exhibit "B"). (Page 9, lines 28-30.)

"Had worked trimming coal (with the hands in the lower hold of Compartment No. 2) before the boat left Boat Harbor." (Page 12, lines 1-3.)

"Was in the last gang to work in No. 2 hold * * * *when we went out lots of space there* * * * vessel in a hurry to get back to Seattle * * * got order to go back and go to Bellingham and take freight for Alaska." (Page 12, lines 5-10.)

"Plat marked 2 Exhibit 'B' reasonably represents the condition of the *spaces* and the coal and *how far it had been trimmed* at the time of explosion." (Page 12, lines 15-26.)

TESTIMONY OF EDWARD McDONOUGH, boatswain of the ship at the time of the explosion:

"*After the explosion*, not on 'tween decks, but down in the hold; *I worked underneath 'tween decks*

between the coal and the ship's sides." (Page 78, lines 18-28.)

"Hold (No. 2 hatch) was filled to a certain extent, but *when we went down there after the explosion happened, I went down there and walked around. I am not sure of any space on 'tween decks, but down there in the lower hold where I walked there was.*" (Page 79, lines 1-10.)

"Found plenty of space in the lower hold * * * there was *plenty of space there.*" (Page 80, lines 20-23.)

DEPOSITION OF SAMUEL DONOVAN:

"When everything cooled off (after the explosion) we went down in the lower hold (Compartment 2) trimming it again when everything was cool * * * and trimmed it over from the hatch then enough to get the hatches on to take in freight." (Page 117, lines 6-11.)

"Quite a space in the lower hold * * * 8 or 10 feet * * * when got down in lower hold (hatch No. 2) and got this clear away, we could stand up and shovel * * * straight forward, and I guess *I am nearly six feet* and I had lots of room myself." (Page 117, lines 18-22.)

DEPOSITION OF PETER IVERSON:

“When he (Sorenson) got down (in lower hold) he said *all kinds of space down here.*” (Page 149, lines 2-15.)

“Top of the coal (’tween decks hatch, compartment No. 2) was 6 or 7 feet. * * * There was all kinds of room down there * * * there was place for tons of coal down there * * * length of the hatch was 16 or 17 feet.” (Page 149, lines 12-26.)

The only evidence in any degree contrary is the testimony of the mate, Johnson. He testifies: “Don’t know how the explosion occurred.” (Page 117, lines 7-9.)

After the explosion Johnson went down in Compartment No. 2 and was overcome by the gas, rendered unconscious for half an hour and was sick the balance of the afternoon. That his evidence in the face of the four above witnesses is proven to be false, but what is infinitely worse, as first officer of the ship, he changed the entry in the log to show that no such *orders* were given the crew as testified by these witnesses and the boatswain of the ship. This change is made with a different pen and different ink. He testifies to this change: “Made entry in log of occurrence (explosion) * * * *the same day it happened* (on the 21st of February;

Proctor Bogle reads entry in log); entry was made right away * * * after *a few minutes* I went right up and made entry in the log book * * * right away, as required by law.” (Page 115, lines 19-30.)

“I changed the entry later on * * * that evening * * * I read it over and I said ‘*there is no use putting it down that way*’ * * * took my fountain pen and wrote that word ‘ordered.’” (Log Book Exhibit; page 116, lines 2-7.)

The above testimony is palpably false. First, he made the change after a *few minutes*; second, *later in the evening*. The whole was false, for he was unconscious for an half hour after the explosion, and remained sick the balance of the afternoon. McDonough, boatswain, testifies: “I did know that Johnson was in the room for the balance of the afternoon, and from the effects of the gas.” (Page 56; lines 1-16.)

Another important fact showing how shameless and untrue his statement of the change in the log is that this libel was not commenced nor filed until the 22nd day of September, 1916, seven months after the explosion, the first knowledge he had that the orders of the boatswain would become an important or controlling feature in this suit.

Upon the above testimony the District Court finds that there existed "a small V-shaped opening."

II.

The contention of libellant as to the second error assigned is the same as set forth in the first above Specifications of Errors, and the citation of testimony and authorities thereunder set forth are hereby referred to in maintaining the second error assigned.

III.

There is no evidence to support error numbered three, that an "open space still remained from the sides of the ship to the place where the coal was thrown of some six or seven feet for the full space 'tween decks."

The Honorable District Court in this statement shows the utter absence of consideration of the evidence of Witnesses Sorenson, McDonough, Donovan and Iverson as set forth under Specifications of Errors No. 1, to which we earnestly refer as completely upholding appellant's contention that no "open space still remained from the sides of the ship to the place where the coal was thrown of some six or seven feet for the *full space 'tween decks.*"

This finding of the Honorable District Court seems impossible in view of the evidence, for the

record shows the vessel to be forty feet beam with 16x16 hatches, so the space left was about 12 feet either side of the hatch to the wings on 'tween decks, and the space in the wings and aft were filled until the coal ran back on the shovellers.

IV.

Under the fourth error assigned the Honorable District Court again shows a lack of appreciation of the evidence given in the cause, in stating, that "Libellant, instead of shovelling the coal to the sides of the vessel and filling the wings and aft, dug a hole to the V-shaped opening in the hold of the vessel." Libellant did dig a hole in the corner of 'tween decks hatch, after shovelling to the wings and aft bulkhead until the coal ran back on the shovellers, and then a cone-shaped pile was still left in 'tween decks hatch that must be trimmed to put the hatch covers on to take in freight.

The only evidence that would go to establish this finding of the Honorable District Court we most respectfully contend is that of the mate, Johnson, while in positive and direct terms the members of the crew shovelling the coal is wholly to the contrary.

TRANSCRIPT OF TESTIMONY.

LIBELLANT SORENSON TESTIFIES:

“Plat 2, Exhibit ‘B’ reasonably represents the condition of the spaces and the coal, and how far it had been trimmed at the time of the explosion.” (Page 12, lines 15-26.)

“Received orders from the boatswain * * * to go down in No. 2 and trim the coal away, and leave as much space as possible in the forepart of ’tween decks, because we are going to Bellingham to take in freight, and to trim it in the wings and after part (’tween decks hatch) to do away with it the best way you possibly can.” (Page 8, lines 23-29.)

“Exhibit ‘A’ fairly represents the coal when we took the lines aboard and left the dock at Boat Harbor.” (Page 7, lines 13-24.)

“We were trimming coal in the wings and after part (of ’tween decks hatch) * * * was full and the wings got full and we could *not throw any more coal in the wings* and there was still a pile of coal left in the hatch (about 16 feet square), so I came out in the hatch in the hatch coaming and cut a hole in the corner, in the forward corner in the starboard side of the hatch coaming in the ’tween decks.” (Page 9, lines 4 -10.)

(Marks Exhibit “B” in red pencil.)

“We were trimming coal up towards the wings, and the after part and we filled that up.” (Page 9, lines 13-15.)

“The best way to get away with the coal was to go down underneath the 'tween decks.” (Page 9, lines 25-27.)

“The coal spread out on 'tween decks * * * it took us from seven o'clock in the morning until ten o'clock to get to the hatch coaming * * * about eight feet from 'tween decks to steerage deck and the hatch is about 16x16 feet.” (Page 25, lines 14-28.)

“ 'Tween decks hatch is about one-third of the width of the ship.” (Page 27, lines 1-2.)

“The wings of the ship were full and the coal coming back on us * * * the *after part was full* * * * if it had not been we could have thrown that pile on the after part.” (Page 31, lines 22-26.)

“Shovelled the coal up on the sides of the ship and against the bulkhead (aft) until the coal rolled back.” (Page 39, lines 11-15.)

“The hump (in hatch No. 2, 'tween decks) was still left after throwing the coal up against the sides of the ship and the bulkhead aft until it ran back and we could shovel no more.” (Page 39, lines 18-28.)

“The only place to put this hump (in ’tween decks hatch) was in there” (meaning the space in the lower hold below the ’tween decks hatch). (Page 39, lines 31-32.)

DEPOSITION OF SAMUEL DONOVAN:

(Trimmed coal) “right up to the wings * * * could not get any higher * * * it started to run down on us.” (Page 108, lines 8-11.)

“Could not throw any more.” (Page 112, line 29.)

“In both sides of compartment.” (Page 114, lines 2-3.)

“We could not get more coal in the wings and we started to go into the lower hold.” (Page 114, lines 9-11.)

CROSS-EXAMINATION:

“Told him (boatswain) we could not get in any more (in the wings) and the best thing to do was to try and get into the hold.” (Page 134, lines 26-29.)

“He says do the best you can to get the hatch clear.” (Page 135, lines 8-10.)

“We told the boatswain about it.” (Page 136.)

“It was piled right up to the coaming of the hatch.” (Page 136, lines 14-21.)

“Told the boatswain about it (trimming in lower hold) before we done it.” (Page 139, line 30.)

“He said, Do the best you can * * * that is what he told us to do, the best we could. He did not care where we put it so long as we got the hatches on.” (Page 141, lines 5-13.)

DEPOSITION OF PETER IVERSON:

“When we come to Seattle, started to trim coal to make space for freight * * * trimmed as far as we could in the wings, until we got down as low as 'tween decks.” (Page 149, lines 2-15.)

“Top of the coal was 6 or 7 feet (coal in hatch No. 2, 'tween decks) there was all kinds of room down there (hold below 'tween decks) * * * there was space for tons of coal down there * * * length of hatch about 16 or 17 feet.” (Page 149, lines 12-26.)

“Could not get any more coal in the wings because the wings were full.” (Page 154, lines 1-10.)

CROSS-EXAMINATION:

“Orders we got from the boatswain to go there and trim the coal to make space for cargo, and go down and *trim it the best way you know how.*” (Page 189, lines 12-16.)

We most respectfully urge that the evidence against the findings of the District Court, specified

in the fourth error assigned, is conclusively against the finding.

V.

Again, under the fifth error assigned, the Honorable District Court manifests the same disregard of the evidence on this point in stating that, "no specific order was given to take the lanterns," as a reason for the men using lanterns, as the evidence of the libellant and the crew ordered to trim coal is nearly wholly to the contrary.

TESTIMONY OF LIBELLANT SORENSON:

"That morning, February 21st, 1916, at seven o'clock A. M., the lanterns were standing outside the door, where we were living; the place is called the intermediate, and lanterns and shovels were standing outside."

"The lanterns were lit already; not the place the lanterns were kept; lanterns are kept in the lamp locker about 35 feet from there. I and several others were told to go to No. 2 hold and trim coal." (Page 13, lines 20-30.)

"The lanterns were furnished by the ship." (Page 14, lines 11-13.)

"Lanterns were just tubular lanterns * * * kept in (ships) lamp locker * * * watchman has charge of the lamps." (Page 34, lines 1-14.)

“Lanterns ordinary lantern * * * * used on board ship for any kind of work * * * open at chimney top, and air holes underneath for circulation of air * * * ordinary tubular lanterns.” (Page 38, lines 19-30.)

TESTIMONY OF EDWARD McDONOUGH, Boatswain.

“Sent Sorenson and most all the sailors to trim coal in compartment No. 2 * * * and each man had a lantern; they were already that morning * * * each man had a shovel and a lantern.” (Page 54, lines 2-27.)

TESTIMONY OF MATE JOHNSON:

“Keep the lamps in the lamp locker * * * the watchman has charge of them and also the oil lamps and lanterns and the filling of them.” (Page 118, lines 6-9.)

DEPOSITION OF SAM DONOVAN:

“Boatswain told us to get shovels and get the lamps.” (Page 131, lines 22-28.)

DEPOSITION OF PETER IVERSON:

“Lamps (lanterns) were ready for us in the morning * * * that was ordered by the boatswain.” (Page 154.)

“The boatswain ordered us to go into the lower hold and trim coal with the open lanterns.” (Page 187, lines 28-30.)

The lanterns lighted and shovels being placed ready for the crew, just outside their quarters, with orders to go below and trim coal scarcely needed a specific order "*to take the lanterns,*" but Witnesses Donovan and Iverson both testify that the boatswain gave that order.

VI.

The error of the Honorable District Court in finding "it is not necessary to discuss the ventilation of the hold of the ship" is so inconsiderate of the facts showing that there was a dangerous explosion of coal gas in Compartment No. 2, a seaman severely burned and maimed for life, all of which was the fault of the officers and servants of the vessel, and showed conclusively that the S. S. Victoria at the time was unseaworthy.

The coal was poured through the chutes into the hatches of Compartment No. 2 through three decks into the hold; it filled the lower hold until the hatch of Compartment No. 2, 'tween decks, was full and then spread over the floor of the between deck, all around the hatch. This, as already shown by the mass of evidence cited, still left a considerable space around the hatchway of the 'tween decks hatch in the lower hold,

The mass of coal continued to be poured in until

all ventilation in the lower hold was shut off in Compartment No. 2.

The coal gas accumulated there; the explosion took place there; Sorenson was terribly injured there; and the first officer, Johnson, and Boatswain McDonough were suffocated, rendered unconscious for a half an hour and ill for half a day from the effects of the gas confined in No. 2 hold subsequent to the explosion.

There was some testimony on the part of the respondent to the effect that explosions from coal gas confined for two days were unusual; but be that as it may, it is admitted that the explosion did take place and appellant was terribly injured, and that it was from coal gas in No. 2 Compartment.

There were no ventilators in Compartment No. 2 which reached more than a short distance below the steerage deck; the hold was ventilated by the open hatchway, and this had been closed from the time the boat left Boat Harbor for about fifty hours before the explosion:

TESTIMONY OF HENRY SORENSON, Libellant,

“Ventilators go through two decks * * * they finish underneath the steerage deck * * * to give steerage passengers air when steerage passengers sleep ’tween decks * * * ventilators go below steer-

age deck about three inches.” (Page 19, lines 21-30.)

“No ventilators in the lower hold, not lower than ’tween decks.” (Page 20, lines 21-30.)

TESTIMONY OF BOATSWAIN McDONOUGH:

“Ventilators go only as far as ’tween decks.” (Page 56, lines 26-30.)

“Through the steerage deck * * * do not go below the steerage deck.” (Page 56, lines 21-30.)

TESTIMONY OF ROBERT JENSEN, former boatswain of S. S. Victoria:

“Ventilators in No. 2 hatch * * * they go as far as the steerage deck * * * that is as far as they go.” (Page 75, lines 27-30.)

“Go as far as steerage deck to give ventilation for steerage passengers.” (Page 76, lines 1-4.)

DEPOSITION OF CAPT. O'BRIEN.

Captain O'Brien, master of the S. S. Victoria, testifies that while the steamer “Queen of the Pacific” lay at Nanaimo had coal gas explosion on board, which killed four or five persons while taking coal at said place. “There was an explosion on board the ‘Queen of the Pacific’ (now ‘Queen’) in which four or five persons were killed from an explosion of coal gas * * * was lying in Nanaimo or Departure Bay * * * about 35 or 40 miles from Boat Harbor.” (Page 358, lines 22-30.)

“There was a *coal explosion, of course*” (on S. S. Victoria). (Page 370, line 1.)

And yet the Honorable District Court finds that “it is not necessary to discuss the ventilation of the hold of the ship.”

VII.

The Honorable District Court again, under the seventh error assigned, states, “the contention of libellant would have more force if the libellant was at a place where he was directed to be,” shows the distraction of the mind of the District Court from the ample evidence of the orders given by the officers of the ship “to trim the coal between decks so as to take in freight; trim it anywhere, do the best you can,” and that the boatswain of the S. S. Victoria testified that the place where the libellant was, *was the natural and proper place* to trim the cone-shaped pile left standing in the between decks hatchway.

The libellant and several of the crew with him had partially trimmed the coal in the lower hold, Compartment No. 2, at Boat Harbor, and after trimming the coal in this compartment in the wings and aft until the coal from the pile ran back on the shovellers, libellant dug the hole in the hatch to enable the shovellers to go below between decks to

trim this pile so as to put the hatch covers on for freight space, as ordered.

Whether this finding of the Honorable District Court is sustained or utterly groundless depends upon the orders as to the trimming of the coal in Compartment No. 2, as given by the boatswain of the ship, the scope of these orders and their reasonable and natural construction as followed by the crew shovelling the coal.

LIBELLANT SORENSON TESTIFIES.

“Received orders from the boatswain * * * to go into No. 2 and trim the coal away, and ‘leave as much space as possible in the fore *part of ’tween decks*, because we are going to Bellingham to take in freight, and to trim it up in the wings and the after part (of ’tween decks) * * * to do away with it the best way you possibly can’.” (Page 8, lines 23-29.)

“Me and several others were told to go into No. 2 hold and trim coal * * * the orders were to trim the coal in the wings and after part, to leave the fore part clear. We were told to do away with it *the best way we possibly could* * * * by the boatswain of the ship.” (Page 14, lines 1-10.)

CROSS-EXAMINATION:

“Was told to do away with the coal the best

way I possibly could and that (below 'tween decks) *was the best way* * * * to go down to get plenty of room 'tween decks for freight, and get all the coal in the lower hold to make room." (Page 34, lines 27-30.)

"It was the best way to get lots of room for freight 'tween decks." (Page 35, lines 15-18.)

"The only place to put this hump was in there (lower hold below 'tween decks)." (Page 40, lines 1-3.)

DEPOSITION OF SAMUEL DONOVAN:

"Boatswain told us to go down and trim the coal as best we could." (Page 133, line 21.)

"We told him we could not get any more (in the wings) and the best thing to do is to try and get into the hold." (Page 134, lines 26-29.)

"He says, '*Do the best you can*; we have got to get the hatch clear.'" (Page 134, lines 8-10.)

"We told the boatswain about it (trimming in the lower hold) *before we done it*." (Page 138, line 30.)

"He said, 'Do the best you can' * * * that is what he told us to do, the best we could. He did not care where we put it so long as we got the hatches on." (Page 141, lines 5-13.)

DEPOSITION OF PETER IVERSON.

CROSS-EXAMINATION :

“We had orders to get it away * * * the easiest way we could * * * that was the easiest way * * * because all kinds of space there (lower hold) * * * orders were to trim coal into the wings and the *best way we could.*” (Page 176, lines 3-11.)

“The boatswain ordered us to go into the lower hold and trim coal with the open lanterns.” (Page 187, lines 28-30.)

“Orders we got from the boatswain to go there and trim coal to make space for cargo, and go down and trim it the *best way you know how.*” (Page 189, lines 12-16.)

The testimony of Edward McDonough, then boatswain of the S. S. Victoria, seems to conclusively show that these men were acting in compliance with orders, but where appellant was injured was the natural, reasonable and proper place and the most expeditious for the purposes of the ship.

“Sent Sorenson and most all the sailors to trim coal in Compartment No. 2 * * * and each man had lanterns * * * they were already lit that morning * * * each man had a shovel and a lantern * * * orders from the chief officer was that they should shovel the coal away from the hatch in the wings

in place, so that we could get cargo in that hold * * * *any place they could shovel it* to get freight in the hold.” (Page 54, lines 2-27.)

“A number of men have sworn here that your orders were to go down and trim the coal in between decks so as to get space to take the cargo in, and *do the best you could* * * * * Do you remember whether or not that is true?”

“I might have said that if the boys said so.” (Page 54, lines 28-30; page 55, lines 1-2.)

CROSS-EXAMINATION :

“The order that I passed to the men was, I said to the boys, I said, Go down in No. 2, I said, and shovel that coal away from the hatch anywhere in the wings so that we can receive freight down there.” (Page 61, lines 1-5.)

“Did not give them any orders to go down to No. 2 hold; it was No. 2 hatch I gave them orders to go down * * * knew on the morning of the accident that these men had taken an open lantern in the lower hold.” (Page 65, lines 7-10.)

(To Bogle) “Know you read it out (affidavit) and I signed it. You made a statement and I read it out. Yes, but you were doing all the talking, though.” (Page 67, lines 8-16.)

Q. "Do you think the recollections of the fact was better at that time than it is now, two months after the accident?

A. "*Well, no; to tell you the truth I think I remember more about it now than then.*" (Page 68, lines 10-18.)

RE-DIRECT EXAMINATION:

"I told the men to trim the coal 'in the wings, or anywhere;' I guess something like that; I might have." (Page 69, lines 26-27.)

EDWARD McDONOUGH, recalled by Proctor Bogle.

"After the explosion not on 'tween decks, but down in the hold, *I worked underneath 'tween decks between the coal and the ship's side.*" (This District Judge's V-shaped hole. Page 78, lines 18-28.)

"Hold (No. 2 hatch) was filled to a certain extent, but when we *went down there after the explosion happened, I went down there and walked around.* I am not sure of any space on 'tween decks between the coal and ship's sides, but *down in the lower hold where I walked around there was.*" (Page 79, lines 1-10.)

"Found plenty of space in lower hold." (Page 80, line 20.)

"There was plenty of space there (lower hold) and naturally enough; I went around down in the

lower hold * * * was the *natural place* to put this hump of coal here in that space * * * if a man wanted to make easy work of it, naturally enough he would put it down there below."

Q. "Was that the proper place to put it?"

A. "This is the proper place, if a man is shovelling coal."

THE COURT: "Where was the proper place?"

A. "To put it down below in the sides of the ship." (Page 80, lines 21-28.)

THE COURT: "Was that the proper place to put it?"

A. "The *proper place to put it was down below.*" (Page 81, lines 1-2.)

PROCTOR BOGLE:

Q. "Why do you say then that it was the proper place to put it below?"

A. "Well, the idea is this: if there is space, down in the hold, naturally you are going to fill the lower hold." (Page 81, lines 1-20.)

Does it not appear from this testimony that the appellant was wholly within the direction and scope of the orders of the officers of the ship as to "the place where he was directed to be?"

Reference is here particularly made to the *significant change in the log of the ship by Mate*

Johnson.

VIII.

The Honorable District Court in its findings set forth in the eighth error, that “the acts with relation to *the sealing of the lower hold having been done by professional sealers engaged for that special purpose*, and the condition of the lower hold being a small V-shaped opening in which little coal could be placed, and *in the absence of any testimony* of any direction to go to that place. * * * *No direction can be attributed to the order of the boatswain*”—this finding, in view of the evidence of orders given, the existing conditions, and the situation of coal already trimmed in Compartment No. 2, is, we most respectfully contend, astonishing.

We hereby refer to the citation of evidence under the first, second and seventh errors assigned, as being indubitable as to the fact that the appellant and men working with him were fully justified; that “direction can be attributed to the order of the boatswain.”

IX.

The same disregard of facts as shown by the Honorable District Court is the misconception of not only the spirit and meaning, but the letter of the Act of March 4th, 1915, 38 Stat. 1185, com-

monly known as the LaFollette Act or Furuseth Law.

The text of Section 20 of the act is as follows:

Section 20: "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be *fellow servants* with those under their authority."

The Honorable District Court finds that the act is "*merely* a provision fixing the status of injured seamen in *command of vessels* with relation to other employees on the ship."

It is a conceded fact that this act was enacted to change the rule of defense as to officers of ships being fellow servants of the injured seamen, as set forth in the *Osceola* case, 189 U. S., page 175.

That case held: First, that members of the crew, except perhaps the master, are, as between themselves, *fellow servants*, and hence seamen cannot recover for injuries sustained through negligence of another member of the crew beyond the expense of their maintenance and cure. Second, that a seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure whether the injuries were received by negligence or accident.

The change in the rule of defense as to officers being fellow servants of the injured seamen, in the LaFollette or Furuseth Law, Act of March 4th, 1915, 38 Stat. Sec. 1185, p. 153, is drastic and takes the very teeth out of the *Osceola* case. It certainly is much more than "merely a provision" fixing the status of seamen in command of vessels with relation to other employees of the ship. It reverses the rule of a leading case so effectually as to render any controlling authority of the case as nugatory.

X, XI, XII.

The errors of the Honorable District Court, as contended for and maintained by libellant in Assignment of Errors X, XI and XII, being cognate matters involve all the issues in the cause already specifically presented, and is here considered and discussed. The errors heretofore discussed are mainly those going to the findings of the Honorable District Court in the memo of decision; but as already shown the decision is referred to in, and a part of, the final decree; therefore all citations of evidence or authorities heretofore made under any specified error, is again referred to, cited and made under Assignment of Errors X, XI and XII.

SPECIFICATIONS OF ERROR X.

The Court erred in entering final decree dismissing.

We most earnestly contend that strong and altogether convincing evidence of appellant's cause was admitted as proof and did not in any way justify the Honorable District Court in dismissing the libel.

The gravamen of the libel is that contractual relations existed between libellant and appellant on February 21st, 1916, and the respondent, Alaska S. S. Co.; that on that day a violent explosion of coal gas occurred in Compartment No. 2 below 'tween decks in the lower hold of the S. S. Victoria, and that appellant was injured. All of the above is admitted by the pleadings.

That the explosion took place by reason of coal gas as above stated in an unventilated part of the ship; the coal when taken aboard was nearly fine dust, and was wetted down with water through a hose and of necessity packed tight; that appellant was seriously burned about the face, body and hands; the left hand being permanently injured so as to destroy his vocation in searfaring and from any manual labor; that appellant was engaged in the performance of duties specially assigned and

under the orders of the officers of the ship, and that appellant was without fault in the premises, has been safely and convincingly established by a large preponderance of the evidence.

That the explosion of coal gas occurred only in the hold below 'tween decks; the coal had been poured through the hatches into the hold until it filled the 'tween decks hatch, spread over 'tween decks and reached above the steerage deck, at Boat Harbor.

A space was left in the hold after partial trimming at said port; there were *no ventilators reaching below 'tween decks*; consequently the coal gas accumulated in a heated ship for about fifty hours.

TESTIMONY OF APPELLANT SORENSON:

“The coal was very fine and kind of wet.”
(Page 12, lines 28-30.)

“Atmosphere was warm * * * being *close to* the boilers.” (Page 19, lines 15-16.)

“Ventilators go through two decks * * * they finish underneath the steerage deck * * * to give steerage passengers air when steerage passengers sleep 'tween decks * * * steerage deck is second deck; * * * ventilators *go below steerage deck about three inches.*” (Page 19, lines 21-30.)

(Marks a little cross on each side hatch coaming.) “No ventilators in lower hold—not lower than ’tween decks.” (Page 20, lines 1-19.)

TESTIMONY OF BOATSWAIN EDWARD McDONOUGH :

(Examining blue prints, ventilators.) “Ventilators go only as far as ’tween decks.” (Page 56, lines 21-30.)

“Through the steerage deck * * * do go below steerage deck.” (Page 56, lines 21-30.)

“They do not go *below ’tween decks*..* * * goes right down where steerage passengers sleep * * * that is, ’tween deck (pointing; explains the position of ventilators above ’tween decks * * * marks the place where the spare bow anchor is kept). (Page 57, lines 1-12.)

“Been in the hold (orlop deck) *don’t know of any ventilation in the hold*.” (Page 57, lines 25-30.)

“Orlop deck down here (showing it on blue print) is away below ’tween decks * * * not a tight deck * * * just loose planks laid down.” (Page 58, lines 1-11.)

TESTIMONY OF ROBERT JENSEN :

“Been a seaman about 15 years; * * * been seaman on Victoria; * * * made trip on Victoria as boatswain * * * well acquainted with her general equipment * * ventilators in No. 2 hatch * * *

they go as far as steerage deck * * * that is far as they go.” (Page 75, lines 27-30.)

“Go as far as steerage deck to give ventilation for steerage passengers.” (Page 76, lines 1-4.)

DEPOSITION OF CAPTAIN O'BRIEN, master of the ship:

“Wet the coal to keep down the gas * * * and to keep the gases from accumulating in the lower hold.” (Page 358, lines 1-7.)

“There was an explosion on the Queen of the Pacific (now Queen) in which four or five were killed from an explosion, of coal gas * * * was lying in Nanaimo or Departure Bay * * * about 35 or 40 miles from Boat Harbor.” (Page 358, lines 22-30.)

“Coal about 48 hours in the hold.” (Page 362, line 15.)

“There was a coal explosion, of course.” (Page 370, line 1.)

APPELLANT WAS PERMANENTLY INJURED.

TESTIMONY OF APPELLANT SORENSON:

“Both hands burned * * * face, elbows, neck and left shoulder * * * unable to close left hand * * * not able to hold on to a thing or do any work as a seaman any more * * * in weather like this (February) hands turn dark blue and fingers

still get more stiff.” (Page 15, lines 23-29.)

“Happened a year ago * * * India ink marks on back of hand burned off * * * burned picture of angel off * * * not same strength in either hand * * * when hospital nothing but red marks showed.” (Page 16, lines 1-21.)

(Explains photo of burns. Libellant's Exhibits Nos. 3, 4, 5, 6 and 7. Page 17, lines 1-9.)

“While in hospital, for 14 days given morphine three times a day to relieve pain * * * impossible to describe the pain * * * was so could not get rest after dressing sores until I got something to take pain away * * * was in hospital for seven weeks * * * unable to feed myself for five weeks.” (Page 18, lines 1-22.)

“Unable to longer do duty as a seaman; * * * many times a seaman *trusts his life to his hands.*” (Page 73, lines 1-10.)

TESTIMONY OF DR. C. S. LEEDE:

“Sorenson showed evidences of extensive burns about six or eight weeks ago when in first, and then second time in company with Dr. Sharples * * * extensive burns of the first and second degree, all over the face to the hair line and on the left shoulder, and the elbows, and had active fresh scars on the backs of both hands.” (Page 43, lines 18-30.)

“Skin of left hand between two fingers so drawn * * * preventing from opening and stretching the fingers apart * * * skin grown to the sinew * * * sinews on back of hand similarly grown to the bones in the middle of the hand, preventing closing it entirely * * * he could not make a fist * * * on other hand a slight web formation * * * as to future * * * scar tissue in the skin has a tendency to shrink * * * tendency is so great that vast and extensive adhesions take place in later years * * * the future of the right hand, it certainly will get no better * * * the left hand, probabilities are that it will get worse.” (Page 44, lines 1-30.)

“I think that the probabilities are that he will get worse in the left hand * * * skin is very poorly nourished * * * blood supply very poor * * * in an injury as an abrasion * * * if he bumps his hand the danger of infection would be greater * * * especially in his vocation as a sailor * * * salt water will probably chap that hand * * * make it impossible to follow his vocation without a great deal of distress and discomfort.” (Page 45, lines 6-20.)

“Don’t see how he could ever hold a rope in his left hand * * * don’t think send him into rigging

with that hand * * * don't see how he could take hold of small lines, which are in rope ladders * * * any abrasion of slightest character would bring about infection." (Page 45, lines 20-30.)

"Don't think he could get a position as a sailor in which he would have to handle ropes and go aloft * * * I think it will be impossible for him to follow that vocation." (Page 46, lines 28-30.)

CROSS-EXAMINATION:

"Was a ship's surgeon * * * about four years ago." (Page 46, lines 28-30.)

"I believe that a captain would think twice before taking a man on shipboard who is not able to hold himself evidently with his left hand in a storm * * * a captain would think twice before he would take risk of that man on his ship. (Page 51, lines 22-29.)

TESTIMONY OF DR. SHARPLES, witness for respondent:

"The injury is permanent." (Page 98, lines 26-27.)

DEPOSITION OF PETER IVERSON:

"Sorenson reached his hands up * * * so I got ahold of them to pull him out * * * *found that my hands had the skin from his hands* * * * it come off from the burns * * * skin come off in my fingers." (Page 151, lines 7-22.)

That appellant was engaged in the performance of his duties specially assigned, and was so engaged under the orders of the officers of the ship.

The testimony on this point is full and conclusive under the 1st, 3rd, 4th, 5th and 7th errors assigned as cited thereunder, and are hereby most respectfully referred to and again cited.

SPECIFICATIONS OF THE XI ERROR.

That the Court erred in refusing to grant a rehearing in said cause before entering the final decree, is manifest from the evidence submitted herein as cited under the different errors assigned, and it would be a mere repetition to do more than refer to the same as being cited hereinunder.

SPECIFICATIONS OF THE XII ERROR.

We again most respectfully contend and earnestly maintain that the Honorable District Court erred in refusing to enter a decree awarding damages to appellant, and adjudging the respondent, its servants, master and crew of the vessel at fault for said explosion and for the serious and severe injuries of appellant and his intense suffering.

A careful review of all the evidence, transcript of testimony, depositions and exhibits in the cause seems so overwhelmingly in appellant's favor that we again express our sense of the want of due con-

sideration by the Honorable District Court of the sworn evidence of witnesses and other evidence offered.

The appellant is justly entitled to an award as demanded in the libel in the sum of \$15,000.00.

He was twenty-four years old, in his twenty-fifth year; in the very prime of young manhood when stricken in the line of duty without fault on his part.

The testimony of Herbert A. Semon, insurance expert of the Prudential Life Insurance Co., shows that appellant, in robust health and without mental or physical defect at the time of his injury, would have an expectancy of life of 38 years more, and even earnings at the rate of but \$50.00 per month would amount to over \$22,500.00. (Attached at end of transcript of testimony.)

ARGUMENT.

The salient facts of this cause are not left in any doubt by either the evidence or the law.

An explosion of coal gas occurs on board of a ship, from an unventilated space, where appellant, an employee, was working in pursuance of the orders of the officers of the vessel.

Appellant is performing his duties in a natural and ordinary, usual and reasonable way, and with-

out fault on his part he is permanently injured in the left hand and otherwise burned about the body, face and hands, and suffers intensely from these injuries.

No contention is made by respondent as to the explosion, nor the injury, except as far as possible to minimize its severity with the view of abating an award for damages.

Appellant vigorously contends that the positive, direct, and overwhelming preponderance of the evidence sustains all the allegations of the libel and that he, in strict justice, is entitled to an ample award for injuries from this Honorable Court, even if he had failed in a degree to establish by direct proof of his cause; the law as to such character of explosion throws the *burden of proof* as to negligence upon the respondent.

PRESUMPTION OF PROOF ARISING FROM EXPLOSIONS.

If a proponent adduces evidence of facts giving rise to a presumption of law in his favor, then the *burden* of adducing evidence to the contrary is cast upon the opponent, and unless he discharges this burden by adducing evidence which tends to overthrow the presumption, the case will be disposed of by the Court as a matter of *law* in favor of the

proponent.

Hammon on Evidence (Ed. 1907), page 12.

The courts generally agree that, where contractual relations exist between the parties, as in cases of *common carriers*, proof of an explosion *carries with it* the presumption of negligence and makes a *prima facie* case.

Ruling Case Law, Vol. 11, Sec. 23, page 670.

Judson vs. Giant Powder Co., 107 Cal. 549;
40 Pac. 1020; 29 L. R. A. 718.

This case holds that a presumption of negligence arises from the fact of an explosion in a dynamite factory, where there is evidence that, if it is carefully handled it will not explode.

Beals vs. Seattle, 28 Wash. 593 (at page 603).

This case holds that, where a traveller upon a highway (streets of Seattle) is injured as the result of the explosion of an *unseen instrument* within the area of the street over which a city has control, a *prima facie* case of negligence is established against the city, regardless whether contractual relations exist between the city and the person injured.

The above cases establish the doctrine that in cases of explosion, where a *prima facie* is made out, that it is incumbent upon the defendant (respondent-appellee herein) to prove that the Alaska Steam-

ship Co. was not negligent.

No where in the evidence submitted by the appellee does any attempt appear to be made that the officers and servants of the Alaska S. S. Co. on the S. S. Victoria were not negligent in the condition of the ship as to unseaworthiness, in the failure to supply and keep in order proper appliances.

The officers gave the men open, unguarded lanterns to go into a place where fine coal, almost dust, was poured without ventilation.

The master knew that just such an explosion had happened before on the "Queen of the Pacific" in which four or five persons were killed under similar circumstances, similar character of coal, mined from the same district.

The ship was equipped with electric cluster lights with extension cords to be used for just such purposes as these men were employed at at the time of the explosion, but were not used until after appellant had been terribly burned.

Liability of vessel for injury to a seaman depends upon the unseaworthiness of the ship, or her failure to *supply and keep in order proper appliances*.

ORDERS TO TRIM COAL.

The citation of evidence under specification of

first error assigned established the fact that ample space for tons of coal was in the lower hold of Compartment No. 2, below 'tween deck, at the time of the explosion. Is not the fact that after the explosion in which appellant was injured, the officers of the Victoria ordered the crew to trim the cone-shaped pile, which filled the 'tween decks hatch in the identical space below 'tween decks in which the explosion occurred, a full recognition of the fact that that was the proper place to store the coal?

All the evidence in the case would seem in no small degree to manifest to this Honorable Court that the seventh error of the Honorable District Court in finding that "the contention of libellant would have more force, if the libellant was at a place where he was directed to be, is without either evidence to support it or reason to sustain it.

Let us critically examine the evidence upon this point which appellant earnestly contends shows that he was not only strictly in the line of his duties at a place where he was directed to be, but also intelligently and faithfully executing the orders of the boatswain as to where he should trim the "cone-shaped pile" left in 'tween decks hatchway.

In order to show that libellant's contention is absolutely right, we take the liberty of repeating the

evidence upon this question.

LIBELLANT SORENSON TESTIFIES:

“Received orders from the boatswain * * * to go into No. 2 and trim the coal away, and ‘leave as much space as possible in the fore part of ’tween decks because we are going to Bellingham to take in freight, and to trim it up in the wings and the after part (of ’tween decks) * * * to do away with it the best way you possibly can.’” (Page 8, lines 23-29.)

“Me and several others were told to go into No. 2 hold and trim coal * * * the orders were to trim the coal in the wings and after part, to leave the fore part clear.” “We were told to do away with it *the best way be possibly could* * * * by the boatswain of the ship.” (Page 14, lines 1-10.)

CROSS-EXAMINATION:

“Was told to do away with the coal the best way *I possibly could* and that (below ’tween decks) *was the best way* * * * to go down to get plenty of room ’tween decks for freight, and get all the coal in the lower hold to make room.” (Page 34, lines 27-30.)

“It was the best way to get lots of room for *freight* ’tween decks.” (Page 35, lines 15-18.)

“The only place to put this hump was in there (lower hold below ’tween decks).” (Page 40, lines

1-3).

DEPOSITION OF SAMUEL DONOVAN:

“Boatswain told us to go down and trim the coal as best we could.” (Page 133, line 21.)

“We told him we could not get any more (in the wings) and the best thing to do is to try and get into the hold.” (Page 134, lines 26-29.)

“He says, *do the best you can*; we have got to get the *hatch clear*.” (Page 134, lines 8-10.)

“We told the boatswain about it (trimming in the lower hold) *before we done it*.” (Page 138, line 30.)

“He said, ‘Do the best you can’ * * * that is what he told us to do—the *best we could*. He did not care where we put it so long as we got the *hatches on*.” (Page 141, lines 5-13.)

DEPOSITION OF PETER IVERSON:

CROSS-EXAMINATION:

“We had orders to get it away * * * the easiest way we could * * * that was the easiest way * * * because all kinds of space there (lower hold) * * * orders were to trim coal into the wings and the *best way we could*.” (Page 176, lines 3-11.)

“The boatswain ordered us to go into the lower hold and trim coal with the open lanterns.” (Page 187, lines 28-30.)

“Orders we got from the boatswain to go there and trim coal to make space for cargo, and go down and trim it the *best way you know how.*” (Page 189, lines 12-16.)

TESTIMONY OF EDWARD McDONOUGH:

“Sent Sorenson and most all the sailors to trim coal in Compartment No. 2 * * * and each man had lantern * * * they were already lit that morning * * * each man had a shovel and a lantern * * * orders from the chief officer was that they should shovel the coal away from the hatch in the wings in place so that we could get cargo in that hold * * * *any place they could shovel it* to get freight in the hold.” (Page 54, lines 2-27.)

Q. “A number of men have sworn here that your orders were to go down and trim the coal in between decks so as to get space to take the cargo in, and *do the best you could* * * * Do you remember whether or not that is true?”

A. “I might have said that if the boys said so.” (Page 54, lines 28-30; page 55, lines 1-2.)

CROSS-EXAMINATION:

“The order that I passed to the men was, I said to the boys, I said, Go down in No. 2, I said, and shovel that coal away from the hatch anywhere in the wings so that we can receive freight down

there.” (Page 61, lines 1-5.)

“Did not give them any orders to go down to No. 2 hold; it was No. 2 hatch I gave them orders to go down * * * knew on the morning of the accident that these men had taken an open lantern in the lower hold.” (Page 65, lines 7-10.)

RE-DIRECT EXAMINATION:

“I told the men to trim the coal in the wings, *or anywhere*, I guess something like that; I might have.” (Page 69, lines 26-27.)

EDWARD McDONOUGH, recalled by Proctor Bogle:

“After the explosion not on ’tween decks, but down in the hold, *I worked underneath ’tween decks between the coal and the ship’s side.*” (This District Judge’s V-shaped hole.) (Page 78, lines 18-28.)

“Hold (No. 2 hatch) was filed to a certain extent, but when we *went down there after the explosion happened, I went down there and walked around.* I am not sure of any space on ’tween decks between the coal and ship’s sides, but *down in the lower hold where I walked around there was.*” (Page 79, lines 1-10.)

“There was plenty of space there (lower hold) and naturally enough I went around down in the lower hold * * * was the *natural place* to put this hump of coal here in that space * * * if a man

wanted to make easy work of it, naturally enough he would put it down there below."

Q. "Was that the proper place to put it?"

A. "This is the proper place, if a man is shoveling coal."

THE COURT: "Where was the proper place?"

A. "To put it down below in the sides of the ship." (Page 80, lines 21-28.)

THE COURT: "Was that the proper place to put it?"

A. "*The proper place to put it was down below.*" (Page 81, lines 1-2.)

(Proctor Bogle) Q. "Why do you say, then, that it was the proper place to put it below?"

A. "Well, the idea is this: if there is space down in the hold, naturally you are going to fill the lower hold." (Page 81, lines 1-20.)

Does it not appear from this testimony that the appellant was wholly within the direct and scope of the orders of the officers of the ship as to "the place where he was directed to be?"

NEGLIGENCE.

The ship was *unseaworthy* by reason of the fact that there was no ventilation in the lower hold, Compartment No. 2, where the explosion occurred.

The testimony cited under the sixth error as-

signed is full and complete that no ventilation existed in the lower hold for about fifty hours, and all citations under said sixth error are hereby referred to and recited upon this point.

Further, negligence is emphasized by the recognition of their former negligence, in order *no more lanterns* to be taken down there, and instead to use the electric cluster lights.

DEPOSITION OF PETER IVERSON :

“The second mate was in charge after the accident.” (Page 157, lines 1-7.)

“Used electric lights to trim coal in the lower hold ’tween decks, cluster lights.” (Page 157, lines 15-18.)

“After the explosion guess they got scared to send us down there with lights like that” (lanterns). (Page 157, lines 24-30.)

“There was orders then; I don’t know whether from the captain; to use no more lights down there whatever * * * took ventilation holes off the corners of the hatch so that there would be plenty of air down there.” (Page 157, lines 24-30.)

Why was not this precaution of using electric lights exercised before appellant was put out of commission?

Captain O’Brien, master of the vessel, had been

long years in service as shipmaster, knew of similar explosion on "Queen of the Pacific," in which several human lives were lost, and personally ordered this coal, nearly dust, to be wetted, to *keep down the coal gases*. This alone shows he knew that coal gases would accumulate.

DEPOSITION OF CANTAIN O'BRIEN :

"Wet the coal to keep down gases, and to keep gases from accumulating in the lower hold." (Page 358, lines 1-7.)

ASSUMPTION OF RISK.

"It is fundamental that a servant on accepting an employment, assumes all the ordinary and usual risks and perils incident to the employment, as well as all risks which he knows, or in the exercise of reasonable care may know exist.

"But the *exception is fundamental*, and as well settled as the rule, that the servant does not assume such risks as are created by the master's negligence, nor such as are latent, nor such as are discovered only at the time of the injury."

The Themistocles, 235 Fed. Rep. 81.

This is one of the very latest cases involving the issues in the case at bar, and applied to the established facts, we contend is conclusive of appellant's rights to an award for his injuries.

Appellant did not know of coal gas in the hold of Compartment No. 2, and the presence of gas was due to the unventilated space in the ship, which the master's experience and knowledge could easily have prevented the explosion by the use of the electrical equipment of the vessel; the presence of coal gas was, as far as the appellant is concerned, unquestionably a *latent fact*, and he only knew of its presence when the explosion took place.

The case of *McGill vs. Michigan S. S. Co.*, 144 Fed. 788, bears a close resemblance to the cause at bar. There the dangerous agency was crude oil in the vessel's tank and the action of giving off gases was not a matter of common knowledge among the workmen, but was a matter familiar only to expert oil men who should have anticipated the danger. Here the agency was coal confined without ventilation and its action in giving off gases was not known to libellant, but was well known to the captain of the *Victoria*, who had previously known of a fatal experience with a similar coal explosion and should have foreseen the explosion.

BOATSWAIN OFFICER OF SHIP.

In the case of *The Colusa*, the U. S. District Court of Northern District of California, First Division, decided May 14th, 1917, No. 16129: "The

boatswain of a ship is held to be a seaman in command, construing the Act of March 4th, 1915, Chap. 153, 38 Stat. 1164, commonly known as the LaFollette or Furuseth law. Adv. Sheets, July 26th, 1917, Fed. Rep. Vol. 241, page 968."

In the case at bar, Edward McDonough, a witness in this cause was the boatswain of the S. S. Victoria, and gave orders and superintended the trimming of the coal in Compartment No. 2, where appellant was injured.

In conclusion, there would seem to be no doubt as to the appellant being single-minded in *doing the best he could*.

He knew that ample space existed in the space below 'tween decks hatch; that the boatswain wanted the hatch covers of 'tween decks on to use as space for freight; that the wings and aft 'tween decks was full so that the coal ran back upon the shovellers, and the natural and proper place for the hump in 'tween decks hatch was in the space below.

What reasonable man under the orders of the boatswain, to "trim it anywhere" and the requirement for freight space, but who would have done his best to get rid of the hump of coal, for the benefit of the ship in the most expeditious, natural and proper place—in the lower hold of the ship?

It does seem that he employed only an honest effort to serve his employers within the line of his duties and the orders of his superiors.

In conclusion, seeking only that the broad rules of justice which are administered in a Court of Admiralty, be given his cause, the appellant most respectfully submits that he is entitled to the award claimed herein.

JAMES B. METCALFE,
J. VERNON METCALFE,
Proctors for Appellant.

